

Message Text

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ACTION SEC-03

INFO OCT-01 ARA-16 EUR-25 ADP-00 SS-15 NSC-10 EB-11 COME-00

TRSE-00 JUSE-00 L-03 SSO-00 NSCE-00 USIE-00 INRE-00

PA-03 PRS-01 CIAE-00 INR-10 NSAE-00 RSC-01 RSR-01

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INFO AMEMBASSY OTTAWA PRIORITY

UNCLAS SECTION 1 OF 2 NASSAU 1170

E. O. 11652: N/A

TAGS: EFIN BF US

SUBJ: IOS INVESTMENT PROGRAM LTD

REF: SPORKIN/CHESHES TELCON 8/27

FOR MR. IRVING POLLACK, DIRECTOR, DIVISION OF ENFORCEMENT,
SECURITIES AND EXCHANGE COMMISSION

1. THE FOLLOWING IS LEGAL OPINION OF ATTORNEY RALPH SELIGMAN
ON INTERIM INTERLOCUTORY INJUNCTION BY BAHAMAS SUPREME COURT.
COPIES OF COURT PAPERS BEING SENT INTERNATIONAL AIR TO POLLACK.

2. BEGIN OPINION - QUOTE

THE IOS INVESTMENT PROGRAM LIMITED

V

OVERSEAS DEVELOPMENT BANK LUXEMBOURG S.A. ET AL

IN THIS CASE A WRIT WAS ISSUED ON THE 20TH AUGUST 1973 BY THE
PLAINTIFFS AGAINST 24 DEFENDANTS SEVERAL OF WHOM ARE BAHAMIAN
COMPANIES AND THEREFORE WITHIN THE JURISDICTION OF THE COURT
AND THE REMAINDER ARE FOREIGN CORPORATION WITH REGISTERED
UNCLASSIFIED

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OFFICES IN LUXEMBOURG, ONTARIO, NETHERLANDS, ANTILLES, NEW
JERSEY, NEW YORK, MARYLAND, FLORIDA, PUERTA RICA, THE VIRGIN
ISLANDS.

THE RELIEF CLAIMED IN THE WRIT IS THE APPOINTMENT OF A RECEIVER TO BE NOMINATED BY THE PLAINTIFF OVER VARIOUS OF THE DEFENDANT'S ASSETS AND AN INJUNCTION FREEZING FUNDS LODGED WITH OTHER OF THE DEFENDANTS WHO ARE BANKS.

ON THE SAME DATE THE WRIT WAS ISSUED VIZ. 20TH AUGUST 1973 A NOTICE OF MOTION FOR AN "INTERIM INTERLOCUTORY INJUNCTION EX PARTE" WAS ISSUED SUPPORTED BY AN AFFIDAVIT OF ONE NORMAN PAUL LEBLANC SWORN AND FILED THE SAME DAY.

ON THE 20TH AUGUST 1973 THE CHIEF JUSTICE HEARD THE APPLICATION EX PARTE AND GRANTED ON INTERIM INJUNCTION RESTRAINING DEALINGS WITH FUNDS BY THE DEFENDANTS UNTIL 2ND OCTOBER 1973 WITH LIBERTY TO THE DEFENDANTS TO APPLY TO DISCHARGE THE INJUNCTION AN GIVING TO THE PLAINTIFFS TWO CLEAR DAYS NOTICE. THE CHIEF JUSTICE FURTHER ORDERED THAT THE PLAINTIFF BE AT LIBERTY TO SERVE NOTICE OF MOTION FOR THE 2ND DAY OF OCTOBER 1973 FOR AN INTERLOCUTORY INJUNCTION WITH THE WRIT OF SUMMONS AND ALSO ORDERED SUBSTITUTED SERVICE BY REGISTERED POST.

IN THIS PRELIMINARY OPINION I PROPOSE TO CONFINE MYSELF TO WHAT APPEARS TO ME TO BE TECHNICAL PROCEDURAL DEFECTS WHICH IPSO FACTO WOULD JUSTIFY SETTING ASIDE THE WRIT, THE SERVICE THEREOF AND THE INJUNCTION FOR IRREGULARITY. THIS IS QUITE INDEPENDANT OF ANY PARTICULAR CASE WHICH ANY INDIVIDUAL DEFENDANT MAY BE ABLE TO ADDUCE ON THE MERITS FOR SETTING ASIDE THE INJUNCTION ON THE GROUNDS OF THE FAILURE OF THE PLAINTIFF TO SHOW UBERIMMA FIDEI IN MAKING FULL DISCLOSURE TO THE COURT ON THE EX PARTE APPLICATION.

IN THE FIRST PLACE THE WRIT IS NOT ENDORSED WITH THE PLAINTIFF'S ADDRESS CONTRARY TO O.6 R.5 (1)(A). BUT THIS DEFECT CAN BE CURED BY REQUIRING THE PLAINTIFF BY ORDER OF THE COURT TO AMEND THE WRIT.

SECONDLY IT SHOULD BE NOTED THAT THE FACT OF THERE BEING SEVERAL DEFENDANTS RESIDENT IN THE BAHAMAS AND SEVERAL DEFENDANTS UNCLASSIFIED

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ABROAD BRINGS THE MATTER WITHIN THE SCOPE OF THE MASTERS PRACTICE DIRECTIONS (NO 11 (1) VOLUME 2, PT 4A R.S.C.) WHICH PROVIDES A WRIT OF SUMMONS OR ORIGINATING SUMMONS AGAINST DEFENDANTS ONE OR SOME OF WHOM APPEAR TO BE OUT OF THE JURISDICTION MAY BE ISSUED WITHOUT AN ORDER FOR SERVICE HAVING FIRST BEEN OBTAINED, BUT SUCH WRIT MUST BE SPECIALLY SEALED WITH A NOTIFICATION THAT IT IS "NOT FOR SERVICE OUT OF JURISDICTION".

O. 11/4/1 WHICH REFERS TO THIS PRACTICE DIRECTION GOES ON TO SAY "IN SUCH A CASE APPLY SUBSEQUENTLY TO ISSUE A CONCURRENT WRIT FOR SERVICE OUT OF THE JURISDICTION" AND REFERS TO O.6 R. 6 (NN).

O. 6/6/3 STATES "WHERE A CONCURRENT WRIT IS REQUIRED FOR SERVICE OF THE WRIT OR NOTICE OF THE WRIT OUT OF THE JURISDICTION, LEAVE MUST BE OBTAINED UNDER, AND WILL BE GRANTED ONLY IN CASES WITHIN O.11 R. 1. THE PRACTICE IS TO APPLY FOR LEAVE TO ISSUE A CONCURRENT WRIT AND SERVE IT OR NOTICE OF IT, OUT OF THE JURISDICTION (BODISCHE FALVIK V JOHNSON 1896 1 CH. 25 C.A., THE DUC D'AUMOLE 1903 P. 18. C.A.)".

HAVING REGARD TO THE FOREGOING IT IS CLEAR THAT THE PLAINTIFF HAS ERRED (1) IN NOT INDORSING THE WRIT ISSUED WITH THE WORDS "NOT FOR SERVICE OUT OF JURISDICTION", WHICH WRIT WOULD HAVE BEEN THE PROPER WRIT FOR SERVICE ON THE BAHAMIAN DEFENDANTS (2) IN NOT APPLYING FOR LEAVE TO ISSUE A CONCURRENT WRIT DULY MARKED "CONCURRENT" AND DULY INDORSED "THIS CONCURRENT WRIT WAS ISSUED ON THE (BLANK) DAY OF (BLANK) TO CONFORM WITH O. 6/6/1 AND (3) IN NOT APPLYING FOR LEAVE TO SERVE NOTICE OF THE CONCURRENT WRI TO CONFORM WITH THE PROVISIONS OF O. 11 R 3 WHICH PROVIDES "UNLESS SERVICE IS TO BE EFFECTED IN SCOTLAND, NORTHERN IRELAND, THE ISLE OF MAN OR THE CHANNEL ISLANDS LEAVE GRANTED UNDER RULE 1 OR 2 SHALL BE LEAVE FOR SERVICE OUT OF THE JURISDICTION OF NOTICE OF THE WRIT AND NOT THE WRIT".

IN OTHER WORDS THIS ENGLISH RULE SPECIFICALLY PROVIDES THAT SERVICE OF A WRIT OUTSIDE THE ENGLISH JURISDICTION IS ONLY PERMISSIBLE FOR SCOTLAND, NORTHERN IRELAND, THE ISLE OF MAN OR THE CHANNEL ISLANDS. IN ALL OTHER CASES NOTICE OF THE WRIT UNCLASSIFIED

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AND NOT THE WRIT MUST BE SERVED. IN EXTENDING THIS RULE TO THE BAHAMAS THE LOCAL CIRCUMSTANCES FOR THE SPECIAL PERMISSION OF SERVICE OF THE WRIT AND NOT NOTICE THEREOF ARE CLEARLY NOT APPLICABLE AND IT IS CLEAR THAT THERE IS NO SPECIAL CIRCUMSTANCES IN THE BAHAMAS JUSTIFYING THE SERVICE OF THE WRIT ITSELF (AS APPOSED TO NOTICE OF THE WRIT) OUT OF THE JURISDICTION. ACCORDINGLY, NOTICE OF THE WRIT SHOULD BE SERVED IN ALL CASES ON FOREIGN DEFENDANTS NOT WITHIN THE JURISDICTION OF THE BAHAMAS. IN THE INSTANT CASE, HOWEVER, THE PLAINTIFF WRONGLY SOUGHT AND OBTAINED LEAVE TO SERVE THE WRIT AND NOT NOTICE THEREOF ON THE FOREIGN DEFENDANTS.

BUT PERHAPS THE MOST VITAL DEFECT OF ALL IN THE INSTANT PROCEEDINGS IS TO BE FOUND ON A CLOSER EXAMINATION OF THE PRECEDING QUOTATION FROM O. 6/6/3 THAT "LEAVE MUST BE OBTAINED UNDER, AND WILL BE GRANTED ONLY IN CASES WITHIN O.11 R.1".
SPEAR

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O P 272107Z AUG 73

FM AMEMBASSY NASSAU

TO SECSTATE WASHDC IMMEDIATE 4526

INFO AMEMBASSY OTTAWA PRIORITY

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FOR MR. IRVING POLLACK, DIRECTOR, DIVISION OF ENFORCEMENT,
SECURITIES AND EXCHANGE COMMISSION

O.11 R.1 IS THE CORDINAL RULE GOVERNING SERVICE OUT OF THE JURISDICTION AND IT PROVIDES "1-(1) SUBJECT TO RULE 3.... SERVICE OF A WRIT, OR NOTICE OF A WRIT, OUT OF THE JURISDICTION IS PERMISSIBLE WITH THE LEAVE OF THE COURT IN THE FOLLOWING CASES, THAT IS TO SAY...." THE RULE GOES ON TO SET OUT FOURTEEN SPECIFIC INSTANCES SUCH AS E.G. MATTERS AFFECTING LAND WITHIN THE JURISDICTION, ACTIONS FOUNDED OR TORTS COMMITTED WITHIN THE JURISDICTION, TRUSTS THAT OUT TO BE EXECUTED ACCORDING TO ENGLISH LAW, ACTIONS CONCERNING CONTRACTS GOVERNED BY ENGLISH LAW, ETC.

O.11 R. 4 PROVIDES THAT (1) "AN APPLICATION FOR THE GRANT OF LEAVE UNDER RULE 1 MUST BE SUPPORTED BY AN AFFIDAVIT STATING THE GROUNDS ON WHICH THE APPLIATION IS MADE AND THAT IN THE DEPENDENTS BELIEF THE PLAINTIFF HAS A GOOD CAUSE OF ACTION, AND SHOWING IN WHAT PLACE OR COUNTRY THE DEFENDANT IS, OR PROBABLY MAY BE FOUND" AND (2) NO SUCH LEAVE SHALL BE GRANTED UNLESS IT SHALL BE MADE SUFFICIENTLY CLEAR TO THE COURT THAT THE CASE IS A PROPER ONE FOR SERVICE OUT OF THE JURISDICTION UNDER THE ORDER. "AND (4) "AN ORDER GRANTING UNDER RULE 1 LEAVE TO UNCLASSIFIED

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SERVE A WRIT, OR NOTICE OF A WRIT, OUT OF THE JURISDICTION MUST LIMIT A TIME WITHIN WHICH THE DEFENDANT TO BE SERVED MUST ENTER AN APPEARANCE:"

THE NOTES TO THIS RULE PROVIDE THAT "THOUGH THE APPLICANT NEED ONLY ESTABLISHED A "PRIMA FACIE" OR "GOOD ARGUABLE CASE" THE THE AFFIDAVIT SHOULD CONTAIN A FULL STATEMENT OF THE FACTS ON WHICH THE APPLICATION IS BASED, AND WHICH JUSTIFY THE ISSUE

OF THE WRIT AND THE STATEMENT MUST BE FRANK. (SEE O 11/4/3 AND THE CASES CITED THEREUNDER) AND ALSO "THE PROVISIONS OF THE RULE SHOULD BE STRICTLY COMPLIED WITH "(COLLINS V N.B. MERCANTILE INSURANCE 1894 3 CH. 228 AT PP 234-5;) (ALSO IN O 11/4/3).

O 11/4/3 ALSO REMARKS THT THE AFFIDAVIT SHOULD STATE.... SUFFICIENT FACTS TO ENABLE THE MASTER TO DECIDE WHETHER THE CASE IS WITHIN ONE OF THE SUB-PARAGRAPHS OF R.1 AND WHETHER THE CONDITIONS OF THE SUB-PARAGRAPH ARE SATISFIED.

O 11/4/3 FURTHER REMARKS THAT "THE AFFIDAVIT SHOULD STATE IN WHAT PLACE OR COUNTRY THE DEFENDANT IS OR PROBABLY MAY BE FOUND". "LEAVE IS NORMALLY GIVEN TO SERVE IN A PARTICULAR COUNTRY. SERVICE IN ANY OTHER COUNTRY IS BAD. BANNELL V PRESTON (1908) 24.T.L.R. 756 C.A."

IT IS CLEAR FROM THE AFFIDAVIT OF NORMAN LEBLANC THAT NO ATTEMPT WHATSOEVER HAS BEEN MADE TO BRING THE ATTENTION F THE COURT TO THE PROVISIONS OF ANY OF THE RULES OR ORDER 11 NOT TO SATISFY THE COURT THAT THE PLAINTIFFS CASE FALLS WITHIN ANY OF THE SUB-PARAGRAPHS OF ORDER 11 R. 1. NOR DO THE CHIEF JUSTICES' NOTES SHOW ANY REFERENCE TO ORDER 11 BEING CITED BEFORE HIM.

PERHAPS THE REASON FOR THIS IS THATAN EXAMINATION OF THE FOURTEEN SUB-PARAGRAPHS OF ORDER 11 R 1 REVEALS THAT ONLY TWO OF THEM COULD BE SUGGESTED BEING IN ANY WAY RELEVANT TO THE CLAIMS OF THE IOS PROGRAM LIMITED AS INDORSED ON THEIR WRIT.

THESE TWO SUB-PARAGRAPHS (WHICH RENDER SERVICE OUT OF THE JURISDICTION PERMISSABLE) ARE "- PAR (1) "IF IN THE ACTION BEGUN BY THE WRIT AN INJUNCTION IS SOUGHT ORDERING THE DEFEN-
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DANT TO DO OR REFRAIN FROM DOING ANYTHING WITHIN THE JURISDICTION" AND PAR (J) " IF THE ACTION BEGUN BY THE WRIT BEING PROPERLY BROUGHT AGAINST A PERSON DULY SERVED WITHIN THE JURISDCITION A PERSON OUT OF THE JURISDICTION IS A NECESSARY OR PROPER PARTY THERETO".

LEBLANC'S AFFIDAVIT MAKES NO CASE OR CLAIM AGAINST ANY OF THE FOREIGN DEFENDANTS FOR AN INJUNCTION ORDERING SUCH FOREIGN DEFENDANTS FROM DOING ANYTHING ANYTHING WITHIN THE JURISDICTION F THE BAHAMAS. ON THE CONTRARY HE HAS ASKED THE COURT AND THE COURT HAS GIVEN HIM AN ORDER RESTRAINING THE FOREIGN DEFENDANTS FROM DOING THINGS OUTSIDE OF THE JURISDICTION OF THE BAHAMAS. O. 11/1/14 REMARKS AS FOLLOWS "LEAVE MAY BE REFUSED IF THE WRONG IS SUBSTANTIALLY DONE ABROAD (AS WHERE THE LIBEL IS IN A FOREIGN NEWSPAPER WITH A TRIFLING CIRCULATION IN THIS COUNTRY (SEE KROCH V ROSSELL 1937 1 A.E. R. 725) AND ESPECIALLY IF AN INJUNCTION COULD NOT BE ENFORCED IN THIS

COUNTRY OR COULD ONLY BE ENFORCED AGAINST THE SERVANTS OR AGENTS HERE OF A PRINCIPAL ABROAD" (SEE MARSHALL V MARSHALL 1888, 38 CH. D. 330 C.A. AND THE OTHER CASES CITED.)

AS TO WHETHER OR NOT THE FOREIGN DEFENDANTS ARE NECESSARY OR PROPER PARTIES TO THE ACTION AS BROUGHT AGAINST THE BAHAMIAN DEFENDANTS, THE AFFIDAVIT OF LEBLANC DOES NOT SPECIFICALLY ATTEMPT TO SHOW IN WHAT MANNER ANY OF THE FOREIGN DEFENDANTS IS ALLEGED TO BE EITHER A NECESSARY OR A PROPER PARTY TO THE ACTION. IT DOES REFER TO LEGAL PROCEEDINGS IN OTHER JURISDICTION BUT THAT IS A FACTOR WHICH SHOULD MILITATE AGAINST THE COURT ATTEMPTING TO EXERCISE JURISDICTION OVER THE PARTIES THERETO (SEE THE HAGEN 1908 P. 189 AT PAGE 202). FURTHERMORE, THE CLAIM IS FOR THE APPOINTMENT OF A RECEIVER AND MANAGER OVER SEVERAL DEFENDANTS WHO ARE NOT WITHIN THE JURISDICTION OF THE COURT.

BUT IN ANY EVENT THE PLAINTIFF HAS BEEN PREMATURE IF THIS IS WHAT IS RELIED ON BECAUSE THE DEFENDANTS WITHIN THE JURISDICTION MUST HAVE BEEN ACTUALLY SERVED BEFORE LEAVE CAN BE GIVEN (SEE COLLINS V N.B. & M. INSURANCE CO. 1894, 3 CH. 228).

FURTHERMORE, LEBLANC'S AFFIDAVIT DOES NOT PARTICULARISE THE COUNTRIES IN WHICH THE VARIOUS FOREIGN DEFENDANTS ARE TO BE UNCLASSIFIED

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FOUND NOR WHY SUBSTITUTED SERVICE WAS REQUIRED.

IN MOST CASES WHERE LEAVE TO SERVE OUTSIDE THE JURISDICTION IS SOUGHT THE AFFIDAVIT IS NORMALLY IN THE FORM SET OUT IN ATKINS COURT FORMS VOL. 35 FORM 44 PAGE 248. LEBLANC'S AFFIDAVIT BEARS NO RESEMBLANCE TO THIS FORM.

IN ALL THE FOREGOING CIRCUMSTANCES I AM OF OPINION THAT AT LEAST ONE OF THE FOREIGN DEFENDANTS WHEN SERVED SHOULD ENTER A CONDITIONAL APPEARANCE AND THEN APPLY TO HAVE THE SERVICE OF THE WRIT SET ASIDE FOR IRREGULARITY. A SIMULTANEOUS APPLICATION SHOULD ALSO BE MADE TO HAVE THE INJUNCTION DISCHARGED AS BEING IMPROPERLY OBTAINED. IN THE UNLIKELY EVENT OF THE CHIEF JUSTICE REFUSING SUCH APPLICATIONS UPON BEING REFERRED TO THE APPROPRIATE RULES WHICH SHOULD HAVE BEEN BUT WERE NOT CITED TO HIM, I AM OF OPINION THAT THE COURT OF APPEAL WOULD BE VIRTUALLY CERTAIN TO REVERSE SUCH A DECISION.

DATED THIS 27TH DAY OF AUGUST 1973. R. D. SELIGMAN - CHAMBERS,
NASSAU. UNQUOTE.
SPEAR

UNCLASSIFIED

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